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MAY 11 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. [redacted] 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondents (Appellees Below).

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' MOTION TO DISMISS PETITIONS AND AFFIDAVIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. McINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel.

THE BALLOU PRESS NEW YORK

Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors of Morris White, Inc.,
Respondents (Appellees Below).

And now come Valeria E. Coriell, Morris White, Inc., Irving Trust Company, as Receiver of Morris White, Inc., and Michael Hollander, *et al.*, constituting a Committee of Creditors of Morris White, Inc., the respondents above named, by Joseph Glass, Charles B. McInnis, Nathan D. Stern and Milton C. Weisman, their counsel, and move to dismiss the petitions for writs of certiorari heretofore filed

herein by the National Surety Company, *et al.*, the petitioners above named, for the reason that petitioners have waived all right of review by the acceptance of benefits under the orders sought to be reviewed, and for the further reason that said petitions are irregular and insufficient in that The Morris White Handbags Corp., which is directly affected by the orders sought by said petitions to be reviewed, is not named or joined as a party upon either of said petitions.

May 3, 1932.

JOSEPH GLASS,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel for Respondents.

Notice of Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Joseph Glass, sworn to the 3rd day of May, 1932, a copy of which is hereto annexed, and upon the petitions for certiorari and the printed record of the proceedings had in this cause in the United States Circuit Court of Appeals for the Second Circuit and in the United States District Court for the Southern District of New York heretofore filed by peti-

tioners above named with the Clerk of the Supreme Court of the United States, and upon the printed brief, a copy of which is herewith served upon you, we shall on Monday, the 23rd day of May, 1932 make and submit to the Supreme Court of the United States, at a stated term thereof to be held in the City of Washington, District of Columbia, the above motion to dismiss.

Dated, May 3, 1932.

JOSEPH GLASS,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel for Respondents.

To:
GREGORY HANKIN,
CHARLES H. TUTTLE,
SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.

Affidavit of Joseph Glass in Support of Motion to Dismiss.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE OF NEW YORK,

JOSEPH GLASS, being duly sworn, deposes and says: I reside within the Southern District of New York, in the Village of Mount Kisco, County of Westchester, State of New York.

Affidavit of Joseph Glass.

I am a member of the firm of Olcott, Holmes, Glass, Paul & Havens, counsel for Irving Trust Company, as Receiver of Morris White, Inc., one of the respondents above named, and am personally familiar with the proceedings hereinafter mentioned.

On February 23, 1932, petitioners filed in this Court two separate petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Said petitions have been docketed as numbers 726 and 727 on the calendar for the October Term, 1931. This affidavit is submitted in support of respondents' motion to dismiss both said petitions upon the ground that the petitioners, by proceeding, without objection, upon the hearings directed to be taken for their benefit by the orders of the Circuit Court of Appeals sought to be reviewed and by accepting the benefits of said orders, have waived all right to review thereof; and upon the further ground that petitioners' proceedings are fatally defective by reason of the omission of a necessary party from said petitions.

On April 6, 1931, Valeria E. Coriell, respondent above named, filed a creditor's bill against Morris White, Inc., respondent above named, in the District Court of the United States for the Southern District of New York. By order of said District Court, dated April 6, 1931, Irving Trust Company was appointed receiver of the assets of Morris White, Inc. Said receivership was made permanent by order of said District Court, dated June 3, 1931. Said order recites that there was no opposition thereto.

Said receiver, by order of said District Court, dated June 15, 1931, was authorized and directed to accept an offer for the purchase of the assets of Morris White, Inc. Such offer provides that creditors of Morris White, Inc. be paid 100% of their allowed claims in the following manner: 20% in notes, and 80% in preferred stock of The Morris White Handbags

Corp., the purchaser of said assets. Pursuant to the provisions of said order, dated June 15, 1931, the receiver assigned and transferred the assets of Morris White, Inc. to The Morris White Handbags Corp. Of the 250 creditors of Morris White, Inc., only the petitioners, five in number, objected to the acceptance of the offer.

Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit from the aforesaid orders dated June 3, 1931 and June 15, 1931. The decision of said Circuit Court of Appeals, rendered on November 16, 1931, is reported in 54 F. (2d) 255.

Said Circuit Court of Appeals, in its opinion, ruled that petitioners were entitled to the payment in cash of their aliquot shares of the assets transferred by the receiver as aforesaid, or, at their option, of the value of the notes and stock of The Morris White Handbags Corp. offered to them under the terms of sale approved by the District Court; and directed that such amounts be ascertained by a Special Master and be awarded to petitioners. It held (p. 261):

> "* * * The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected. The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. * * * In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. * * * If payment is not thus made in cash, the several amounts

> which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. * * * There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

Orders entered in said Circuit Court of Appeals, remanded the cause to the District Court for further proceedings in accordance with said opinion.

Pursuant to the opinion and the mandates of said Circuit Court of Appeals upon said appeals, an order, dated February 2, 1932, was duly made and entered, after due notice of settlement to petitioners' counsel, in the District Court for the Southern District of New York. A copy of said order of the District Court is hereunto annexed, marked "Exhibit A".

That order of the District Court appoints a Special Master to take testimony and report thereon, in conformity with the opinion of the Circuit Court of Appeals. It provides, among other things, that

> "* * * the expense of the hearings before the said Special Master, including his compensation and the cost of a copy of the minutes of the Special Master shall be paid by The Morris White Handbags Corp. and shall be a charge and a lien upon its property";

Said order further directs that the respondent Irving Trust Co. pay to petitioners costs on the appeal and costs in the District Court. Such costs, which total $1305.30 have been paid by said respondent and have been received and accepted by petitioners.

Petitioners proceeded with the hearings before the Special Master named in the order of said District Court, dated February 2, 1931, without objection. The rights and benefits conferred upon petitioners by the decision and order of said

Circuit Court of Appeals and the order of the District Court entered pursuant thereto were asserted by petitioners' counsel. Petitioners made no application for a stay of the proceedings directed to be taken pursuant to said orders aforesaid.

Hearings before the Special Master were commenced on February 9, 1932, and were continued at length. Prior to February 23, 1932, more than 300 pages of testimony had been taken at such hearings. Petitioners actively participated in all such hearings. The testimony of the witnesses called by petitioners' counsel before the Special Master fills 165 pages of the record upon said hearings. Witnesses on behalf of other parties were extensively cross-examined by petitioners' counsel. A certified copy of the record on the hearings befor the Spcial Master will be filed with the Clerk of this Court.

Substantial charges were incurred for stenographic services and for the rental of space for such hearings and the Special Master became, by reason of his services upon said hearings, entitled to substantial fees.

After participation in all the hearings before the Special Master, petitioners on February 23, 1932, filed in this Court petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the orders of the Circuit Court of Appeals, by which the hearings had been directed to be taken for the benefit of petitioners.

The conduct of petitioners in proceeding before the Special Master, without objection, upon the hearings directed by the Circuit Court of Appeals to be taken for the benefit of petitioners, constitutes an acceptance of the benefits of the orders of said Circuit Court of Appeals and a waiver of all right to review thereof.

The Morris White Handbags Corp., the purchaser under the order of the District Court dated June 15, 1931, is a

necessary party to any proceedings for the review of the orders affected by petitioners' applications. It has not been named or joined as a party to these proceedings.

For the foregoing reasons I respectfully ask that the aforesaid petitions for writs of certiorari be dismissed.

JOSEPH GLASS.

Sworn to before me this
3rd day of May, 1932.

ETHEL COTTER,
Notary Public.
Bronx County Clerk's No. 128
Bronx County Register's No. 31C34
New York Co. Clerk's No. 354
New York Co. Register's No. 4C198
Kings County Clerk's No. 140
Kings County Register's No. 4180
Queens County Clerk's No. 651
Queens County Register's No. 2944
Commission expires March 30, 1934

Exhibit A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

VALERIA E. CORIELLL, Complainant, against MORRIS WHITE, INC., Defendant.	ORDER ON MANDATE IN EQUITY No. E 59-126.

This cause having heretofore come on for hearing in the United States District Court for the Southern District of New York, and a decree, dated June 15, 1931, having been entered herein approving the offer of Lily White herein, and National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc., having thereafter by an appeal procured a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals for the Second Circuit having transmitted to this Court its mandate dated December 2, 1931, by which it appears that at the October Term of said Court for 1931 the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the said transcript of record and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the said order of said District Court be reversed with costs taxed at the sum of $1,175.30, and the cause be remanded to the District Court for further proceedings in accordance with the opinion of said Circuit Court of Appeals for the Second Circuit.

Exhibit A.

Now, upon reading and filing the said mandate, it is

ORDERED, ADJUDGED AND DECREED that the said mandate of said United States Circuit Court of Appeals for the Second Circuit in this cause be and the same hereby is made the judgment of this court; and it is further

ORDERED, ADJUDGED AND DECREED that the said decree of this court dated June 15, 1931 approving the offer of Lily White, in so far as it affects the rights of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc., the appellants herein, be and the same is hereby reversed, with costs of the said appeal as taxed at the sum of $1,175.30, together with the costs in this court, taxed at ; and it is further

ORDERED, ADJUDGED AND DECREED that National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc. have judgment against Irving Trust Company, as Receiver in Equity of Morris White, Inc. for the sum of $1305.30 costs on appeal as taxed and costs in this court, and that Irving Trust Company, as Receiver in Equity of Morris White, Inc. be and it hereby is directed to pay said costs out of moneys in its possession as such Receiver in Equity; and it is further

ORDERED, ADJUDGED AND DECREED that Earl B. Barnes of 76 William Street, Borough of Manhattan, City of New York, be and he hereby is appointed Special Master herein to hear and take testimony and other evidence and to report thereon to this court, in conformity with the aforesaid opinion of said United States Circuit Court of Appeals; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall proceed with said hearings and report thereon

with all convenient speed and as rapidly as he deems it proper, in view of all the circumstances of the case; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain the several amounts of the respective claims of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc. and make an appraisal of the realizable value of said claims as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall take an account of the assets of Morris White, Inc. as of the 15th day of June, 1931, including among such assets all causes of action belonging to Morris White, Inc. and shall ascertain and report the then realizable value of said assets as if sold at a public sale; and shall also take account of the liabilities of Morris White, Inc., as of April 6, 1931, and shall ascertain and report which if any, of said liabilities are entitled to priority of payment; and shall also take an account of the obligations of the Receiver herein and of the expenses of administration of the estate herein incurred up to the fifteenth day of June, 1931; and shall determine through examination of officers and/or agents of the defendant and/or The Handbags Corporation, the nature, quality and amount of inventory on hand as of such dates as may be pertinent to this inquiry; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall conduct hearings and take testimony and other evidence and report as to whether or not preferences or transfers, voidable either at law or in equity, as of June 15, 1931, at the instance of any creditor or other party interested in the assets of the Morris White, Inc., have been granted by the pledging of any assets of Morris White, Inc. or other-

wise; and at the hearings before the said Special Master any creditor of Morris White, Inc. shall have the opportunity of questioning the assignment of accounts by it as collateral and of questioning any such voidable preference or transfer that may have been made; and it is further

ORDERED, ADJUDGED AND DECREED that if it is established that any such voidable preferences or transfers have been granted or made out of the assets of Morris White, Inc., said preferences or transfers are to be regarded by said Special Master as invalid for the purposes of his calculations and the amounts of said preferences or transfers are to be considered by said Special Master as part of the assets of said Morris White, Inc.; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain and report the aliquot share of the assets to be awarded and paid in cash, subject to further order of this court, to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein, and G. Levor & Co., Inc. out of the sum ascertained to be the amount that would have been realized for the assets of Morris White, Inc., on June 15, 1931, had a public sale of said assets been held, after the deduction from said sum of such portion of the obligations of the Receiver and the expenses of administration herein as would have been properly chargeable against the estate had the assets of Morris White, Inc. been liquidated by sale, and the proceeds distributed to creditors in ordinary course, and after the deduction of the liabilities of Morris White, Inc. entitled to priority of payment; or at the option of each of them the preferred stock and notes heretofore offered to them, pursuant to said offer of Lily White, may and shall in like manner be valued by said Special Master, as of the date the reorganization plan became effective, to be

awarded and to be paid in cash to them or any of them subject to the further order of this court; and it is further

ORDERED, ADJUDGED AND DECREED that no bank or other creditor of Morris White, Inc. shall collect on any security which has been pledged as collateral and in addition thereto receive preferred stock and notes but that each bank or other creditor holding any security may agree to receive and shall receive preferred stock and notes only for such sum or sums as their respective claims exceed the realizable value of said collateral; and the said Special Master shall ascertain and report the value of the security, held by secured creditors, for all purposes, as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the expense of the hearings before the said Special Master, including his compensation and the cost of a copy of the minutes of the Special Master shall be paid by The Morris White Handbags Corp. and shall be a charge and a lien upon its property; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall give notice to all the parties hereto of the filing of his report and thereafter any of the parties may apply to this court for such further order thereon as they may be advised: and it is further

ORDERED, ADJUDGED AND DECREED that subject to the provisions of this order and the further order of this court, the reorganization plan represented by the aforesaid offer of Lily White, as modified by this order and by the order entered herein, dated June 15, 1931, be allowed to continue in operation and The Morris White Handbags Corp. be and it hereby is permitted to continue in the conduct of the business heretofore transferred to it pursuant to the terms of the aforesaid order, dated June 15, 1931; and it is further

Exhibit A.

ORDERED, ADJUDGED AND DECREED that all persons, firms or corporations which have heretofore sold and delivered goods, wares and merchandise and/or rendered services to the said The Morris White Handbags Corp. in the regular course of its business and/or which may hereafter sell and deliver goods, wares and merchandise and/or render services to the said The Morris White Handbags Corp. in the regular course of its business shall be entitled to priority of payment out of the assets of The Morris White Handbags Corp., other than such assets as were transferred to the said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931, for any such indebtedness now or hereafter owing by the said The Morris White Handbags Corp. to any such persons, firms or corporations; and it is further

ORDERED, ADJUDGED AND DECREED that A. W. Copp, or such other representative as Irving Trust Company may appoint in place of said A. W. Copp, shall, at the expense of The Morris White Handbags Corp., attend daily, if possible, at the place of business of The Morris White Handbags Corp., and said The Morris White Handbags Corp. shall render to the said A. W. Copp full and complete reports, as and when requested by him, of all details of its business and affairs as the same are carried on, including therein any and all information with respect to purchases, sales, payments, receipts, salaries, rents, expenses, contracts, commitments, and any other matters or things which may in any way affect the assets or liabilities of the said The Morris White Handbags Corp.; that the said The Morris White Handbags Corp. shall give to the said A. W. Copp, or any representative named in his place, any information whatever appertaining to its affairs which the said A. W. Copp, or any representative named in his place, may request; that the said A. W. Copp, or any representative named in his place shall report to the attorneys for the National Surety Co., from

time to time as requested by them; and that Irving Trust Company shall not be under any liability whatsoever as Receiver in Equity of the defendant or otherwise for the management of the business of The Morris White Handbags Corp., or the performance by A. W. Copp, or the representative named in his place, of the duties imposed upon him by this order; and it is further

ORDERED, ADJUDGED AND DECREED that pending the entry of an order of this court upon the report of the said Special Master and for the purpose of securing to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc. payment by the said The Morris White Handbags Corp., out of the assets transferred to the said The Morris White Handbags Corp., pursuant to the order herein dated June 15, 1931, of the amounts which may be determined to be paid to them in cash upon their respective claims, a lien is hereby imposed upon all of the assets of Morris White, Inc., transferred to and remaining in the possession of said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931; except that as to such of said assets as the said The Morris White Handbags Corp. shall hereafter in good faith transfer in the regular course of its business for fair and proper consideration, said lien shall attach to the proceeds of such transfers or successive transfers of such proceeds, and the said The Morris White Handbags Corp. is hereby enjoined and restrained, subject to the further order of this court, from transferring any of said assets of Morris White, Inc., remaining in its possession except in good faith in the regular course of its business and for fair and proper consideration, unless the said The Morris White Handbags Corp. shall file a bond or other security in such amount as may be fixed and approved by this court after hearing the parties in interest; and it is further

Exhibit A.

ORDERED, ADJUDGED AND DECREED that the Morris White Handbags Corporation having paid to Irving Trust Company herein the sum of $33,322.32, represented by it to be the amount payable by it on January 2, 1932 on account of the notes issued pursuant to the terms of the sale approved in the said decree of June 15, 1931, such payment shall not, without further order of the Court, be applied on account of said notes but shall be held by Irving Trust Company as depositary, without prejudice to any of the rights of the parties to this proceeding; and it is further

ORDERED, ADJUDGED AND DECREED that all questions not hereby disposed of are reserved for future adjudication; and that for the purpose of enforcing the provisions of this decree and for the purpose of entering such further orders or decrees as the court may hereafter from time to time determine, the term of this court is hereby extended and jurisdiction of the cause is hereby retained. This order is without prejudice to the motion heretofore made by the Equitable Life Assurance Society to set aside the aforesaid order of June 15, 1931, and without prejudice to such right as it may assert within thirty days after the filing of the report of the Special Master and the entry of an order thereon, to have its aliquot share of the assets of Morris White, Inc., paid to it in cash in accordance with the procedure hereby established, and to have a lien as above provided for the payment of such share.

Dated February 2nd, 1932.

JNO. C. KNOX,
U. S. D. J.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PETITIONS FOR CERTIORARI.

Statement.

Irving Trust Company, one of the respondents above named, was appointed receiver of the assets of the defendant Morris White, Inc., respondent above named, by order of the United States District Court for the Southern District of New York.

Said receivership was made permanent by further order of said District Court, without objection thereto.

The receiver was thereafter directed by order of said District Court to assign and transfer the assets of Morris White, Inc. to The Morris White Handbags Corp. pursuant to an offer for the purchase of said assets. The receiver, pursuant to that order, assigned and transferred said assets to The Morris White Handbags Corp. The offer approved by said order provides that creditors of Morris White, Inc. shall be paid 100% of their allowed claims, as follows: 20% in the notes and 80% in the preferred stock of The Morris White Handbags Corp.

Petitioners, who were the only creditors of Morris White, Inc. that objected to the acceptance of the offer approved by the District Court, appealed to the Circuit Court of Appeals for the Second Circuit from the aforesaid order making the receivership permanent and from the aforesaid order directing the receiver to transfer the assets of Morris White, Inc. to The Morris White Handbags Corp. The said Circuit Court of Appeals rendered its decision on said appeals (54 F. (2d) 255). It ruled that petitioners were entitled to receive payment in cash of their respective aliquot shares of the assets transferred pursuant to the order of the District Court, or, at their option, of the value of the stock and notes offered to creditors of Morris White, Inc. by the offer approved by the District Court; and directed that a Special Master be appointed to ascertain the amount to be paid to petitioners in cash in lieu of the stock and notes offered to creditors in the offer approved by the District Court. The proceedings directed to be taken were for the benefit of petitioners alone. Orders were entered in said Circuit Court of Appeals upon said appeals remanding the cause to the District Court for further proceedings in accordance with the opinion of said Circuit Court of Appeals.

Upon the mandates of the Circuit Court of Appeals, on said appeals, an order was entered in the District Court,

after due notice of settlement, appointing a Special Master to take testimony and other evidence in conformity with the said opinion of the Circuit Court of Appeals. Said order provides that the expense of said hearings and the fees of the Special Master shall be paid by The Morris White Handbags Corp. and shall constitute a lien and charge upon its property. Said order further provides that the receiver shall pay costs on petitioners' appeal and in the District Court. The said costs which are in excess of $1300 have been paid by the receiver and have been received and accepted by petitioners.

Petitioners proceeded to offer proof upon the hearings before the Special Master named in the order of the District Court, as aforesaid, without objection; and they asserted the rights which were awarded to them under the orders of the Circuit Court of Appeals and the order entered in the District Court thereon. No application was made by petitioners for a stay of the proceedings directed by the Circuit Court of Appeals to be taken for petitioners' benefit and no objection was asserted by petitioners to participation in such proceedings. Substantial charges were incurred for stenographic and other services and the Special Master, by virtue of his attendance on such hearings, became entitled to the payment of substantial fees. Such charges and fees constitute a lien on the property of The Morris White Handbags Corp.

Thereafter, on February 23, 1932, petitioners filed in this court two petitions (Nos. 726 and 727, October Term, 1931) for writs of certiorari to review the orders of the Circuit Court of Appeals, pursuant to which proceedings had been taken before the Special Master. The Morris White Handbags Corp. was neither named nor joined as a party in said petitions.

Argument.

1. *The omission of The Morris White Handbags Corp. as a party to petitioners' proceedings in this Court constitutes a fatal defect in petitioners' proceedings and requires the dismissal of both petitions.*

2. *Petitioners have waived all right to review the orders of the Circuit Court of Appeals by participating without objection in the proceedings taken pursuant to said orders and by accepting the benefits thereof.*

POINT I.

The Morris White Handbags Corp., the purchaser of the assets of Morris White Inc. under and pursuant to the orders sought to be reviewed, is a necessary party to all proceedings for review of said orders; and proceedings taken for review of said orders without joining The Morris White Handbags Corp. as a party thereto are fatally defective.

The Morris White Handbags Corp. acquired title to the assets of Morris White, Inc. by virtue of the order appointing a receiver of Morris White, Inc. and the order directing the receiver to transfer those assets to The Morris White Handbags Corp. As purchaser of said assets it is an interested and necessary party in any proceedings for review of the orders pursuant to which it acquired such assets, and is entitled to be heard thereon.

Davis v. *The Mercantile Trust Co.*, 152 U. S. 590 at 595;

Knceland v. *American Loan & Trust Co.*, 136 U. S. 89 at 95;

Baltimore Trust & Guarantee Co. v. *Hofstetter,* 85 Fed. 75 (C. C. A);
Taylor v. *Logan Trust Co.,* 289 Fed. 51 (C. C. A.).

In *Davis* v. *The Mercantile Trust Co., supra,* this Court stated, at page 594:

> "Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers?"

Petitioners' proceedings, which challenge the validity of the sale, are fatally defective by reason of petitioners' failure to join the purchaser as a party thereto, and such proceedings must be dismissed. On this the law is settled.

Davis v. *The Mercantile Trust Co.,* 152 U. S. 590, at 595;
Grand Island & W. C. R. Co. v. *Sweeny,* 103 Fed. 342 (C. C. A.);
Taylor v. *Logan Trust Co.* 289 Fed. 51 (C. C. A.).

POINT II.

Petitioners have waived all right to review the orders of the Circuit Court of Appeals by participating without objection in the proceedings taken pursuant to said orders, for the sole benefit of petitioners, and by accepting the benefits thereof.

In common parlance, petitioners may not eat their cake and have it, too. They may not participate without objection in the proceedings conducted for their sole benefit, pursuant to the orders of the Circuit Court of Appeals and assert the rights awarded to them thereunder and thereafter repudiate their conduct by seeking a review of the orders pursuant to which such proceedings were taken. They may not by equivocal conduct burden other interested parties

with the substantial cost and expense of hearings before a Special Master and thereafter question the orders of the Court upon which such hearings were based. Such conduct is repugnant to orderly legal procedure.

Petitioners by their conduct have waived all right to question the orders herein sought to be reviewed by their petitions for certiorari.

> *Albright* v. *Oyster*, 60 Fed. 644 (C. C. A.);
> *Chase* v. *Driver*, 92 Fed. 780, at 786 (C. C. A.);
> *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.*, 209 Fed. 191, at 193;
> *In Re Minot Auto Co.*, 298 Fed. 853, at 857 (C. C. A.).

In *Chase* v. *Driver*, *supra*, the Circuit Court of Appeals for the Eighth Circuit stated in its opinion:

> "* * * When the decree was entered, he had the option to refrain from filing his bond, and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. *One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens.* * * *"

That the proceedings before the Special Master were not concluded affords petitioners no excuse. Petitioners may not proceed without objection before the Special Master until they have determined that his award will prove unsatisfactory to them and thereafter refuse to continue with such proceedings. They may not saddle another party with the expense of proceedings conducted for their benefit and thereafter seek to repudiate the orders pursuant to which said proceedings were had. By their consent to, and participation without objection in, the hearings before the Special Master, to the substantial prejudice of other parties, petitioners are

estopped from questioning the orders on which such hearings were founded.

It is no excuse that the proceedings before the Special Master were taken pursuant to the order of the Court.

Singer Mfg. Co. v. *Wright,* 141 U. S. 696;
American Book Co. v. *Kansas,* 193 U. S. 49.

In the latter case this Court, in dismissing a writ of error, stated (p. 52):

> "* * * It makes no difference that plaintiff in error 'felt coerced' into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. * * *"

The Judicial Code (R. S. Sec. 1008; U. S. C. A. Title 28, Sec. 350) and the rules of this Court (Rule 38, ¶ 6) make provision for the stay of proceedings ordered below pending the determination of applications for writs of certiorari. Petitioners never made any application for such stay of proceedings and never asserted any objection to participating in such proceedings.

By their conduct petitioners have waived all right to question the orders now sought by them to be reviewed.

CONCLUSION.

For the foregoing reasons both petitions for the issuance of writs of certiorari herein should be dismissed.

Respectfully submitted,

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